

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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Abbey Province, LLC	)	D.T.E. 06-72
	)	
vs.	)	
	)	
KeySpan Energy Delivery New England	)	
_____	)	

**MOTION TO DISMISS**

**I. Introduction**

On August 29, 2006, Abbey Province, LLC ("Abbey"), filed a complaint with the Department of Telecommunications and Energy (the "Department") against KeySpan Energy Delivery New England ("KeySpan")<sup>1</sup>, pursuant to G.L. c. 164 and 220 CMR 14.06 (4) regarding a dispute over the cost responsibility for cast-iron main replacement work undertaken by KeySpan as a direct result of a construction project undertaken by Abbey in the City of Boston in the vicinity of Province Street and Chapman Place. Abbey objects to paying for the full cost of KeySpan's cast-iron main replacement work for two primary reasons. First, Abbey alleges that the cost of the of the pipe replacement beyond the boundary of its construction site is for the convenience and benefit of KeySpan and should be entirely paid for by KeySpan and its customers under normal rates. Alternatively, Abbey suggests that because the pipe is over 80 years old and is

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<sup>1</sup> The correct legal name of the defendant in this matter should be Boston Gas Company d/b/a KeySpan Energy Delivery New England.

fully depreciated. Abbey should only pay for a portion of the new pipe which would be an infrastructure improvement for KeySpan. (Exhibit C to the Abbey complaint at 3).

In its complaint, Abbey asks the Department to (1) order KeySpan to cease and desist from allocating the total cost of cast-iron pipe replacement project to Abbey, determine the appropriate cost allocation between Abbey and KeySpan under the KeySpan Distribution Service Terms and Conditions, M.D.T.E. No. 4 section 5.8 and 5.9 (2) order such alternative dispute resolution as the Department deems necessary and appropriate and, (3) to clarify the requirements for cost reimbursement for cast-iron pipe replacement required by 220 CMR 113.00 et. seq. As discussed below, the Abbey complaint fails to identify any statute or regulation that would present an actionable legal claim to the Department as required by 220 CMR 1.04 (1)(b) 7. Accordingly, the Department should dismiss the Abbey Complaint.

## **II. Factual Background**

Boston Gas Company d/b/a KeySpan Energy Delivery New England (“KeySpan”) is a Massachusetts Corporation with an usual place of business at 52 Second Avenue, Waltham, Massachusetts 02451 and a “Gas Company” as defined by G.L. 164 § 1.

On December 28, 2005, Judith Nitsch Engineering, Inc. (“JNEI”), on behalf of Abbey, informed KeySpan that it had filed applications with the Public Improvement Commission (“PIC”) of the city of Boston in connection with the proposed development of a 31 story mixed use project at 45 Province Street in the City of Boston. The letter, a copy of which is attached as Exhibit KeySpan 1, requests that KeySpan provide input concerning its existing facilities/utilities which will be affected by the proposed project.

By letter dated January 5, 2006, a copy of which is attached as Exhibit KeySpan 2, KeySpan informed JNEI that KeySpan maintains an 8-inch cast-iron main in Province Street and a 6-inch cast-iron main in Chapman Street located 3 feet from the proposed construction.<sup>2</sup> KeySpan further informed JNEI that it did not object to the project receiving PIC approval if Abbey agreed to pay for all costs associated with the relocation of its existing 8-inch and 6-inch cast-iron mains located in the project area. By letter dated March 27, 2006, a copy of which is attached as Exhibit KeySpan 3, Abbey authorized KeySpan to contract the work to replace the gas line in Chapman Place and in Province Street at Abbey's cost. Abbey further requested that KeySpan begin the work as soon as possible so as not to negatively impact the start date of the proposed project (June 1, 2006) and to inform Abbey of the final pricing of the work prior to commencement of the work.

CMR 113.00 et. seq. governs the Operation, Maintenance, Replacement, and Abandonment of Cast Iron Pipelines by Gas Companies in Massachusetts. As required by the regulations, KeySpan reviewed the proposed Abbey project, with particular attention to the requirements of 220 CMR 113.07 (3). Based on this review, KeySpan determined that the proposed project would require the replacement of approximately 420 feet of cast-iron pipe in Province Street and approximately 470 feet of cast-iron pipe in Chapman Place and the adjacent Bosworth Street.<sup>3</sup> Exhibit KeySpan 4 is an internal

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<sup>2</sup> According to KeySpan company records, the Province Street main was installed in 1924 and the Chapman Street main was installed in 1927.

<sup>3</sup> 220 CMR 113.06 provides that "any pipe that replaces cast-iron pipe shall extend a safe distance, *determined by the operator* beyond the point where parallel excavation terminates." (emphasis added)

memo that discusses how this determination was made.<sup>4</sup> KeySpan further determined that there was no adverse leak history for the cast-iron pipe impacted by the Abbey project and that, but for the Abbey project, the cast-iron pipe would not have been scheduled for replacement or abandonment.<sup>5</sup>

As requested, KeySpan informed Abbey that the estimated cost of the cast-iron main replacement work was \$410,000. In an effort to reduce the KeySpan estimated cost, Abbey subsequently requested, and KeySpan agreed, to allow Abbey to contract directly with its site contactor M and X construction for the cast-iron main replacement work. However, KeySpan informed Abbey that KeySpan would still be required to provide the new main and to do the “tie-in” work associated with the main replacement. The cost of the KeySpan labor and materials is \$131,000. (See Exhibit B to the Abbey complaint) To date, Abbey has failed and refused to pay KeySpan for the cost of its work.

### **III. Standard of Review**

The Department’s Procedural Rule 220 CMR 1.06 (6) (e), authorizes a party to move for dismissal as to all issues or any issue in a case at any time after the filing of an initial pleading. In determining whether to grant a motion to dismiss, the Department takes the assertion of fact as true and construes them in favor of the non-moving party.

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<sup>4</sup> In addition, the project design called for the Boston Water and Sewer Commission (“BWSC”) to replace facilities in Province Street and Chapman Street. With regards to Chapman Street the relocated BWSC facilities were in direct conflict with or in close proximity to the KeySpan cast-iron main. With regards to Province Street, the plans called for BWSC to relocate its drain line to the existing location of the KeySpan cast –iron main which presumes that the contractor understood that the KeySpan cast-iron main would be relocated to the opposite side of the street.

<sup>5</sup> In accordance with 220 CMR 113.05 KeySpan maintains a schedule for replacement or abandonment of cast-iron pipe. At no time has the cast-iron pipe located in Province Street or Chapman Street been included on such schedule nor would the criteria for identifying replacement candidates set forth in 220 CMR 113.05 (2) warrant their inclusion on such schedule.

Dismissal will be granted by the Department if it appears that the non-moving party would be entitled to no relief under any statement of facts that could be proven in support of its claim. Massachusetts OilHeat Council, D.T.E. 00-57, (2001) at 6.

#### **IV. Argument**

Abbey's complaint is brought pursuant to G.L. c. 164 and 220 CMR 14.06 (4). First, Abbey cannot simply rely on the General supervisory powers of the Department, G.L. c. 164 §§ 76 and 76 C, as a basis for its claim for relief. In Massachusetts OilHeat Council, D.T.E. 00-57, (2001), where the petitioner attempted to rely on sections 76 and 76 A of G.L. 164 as the basis for a request that the Department open an inquiry into certain practices of Boston Gas company, Colonial Gas Company and Essex Gas Company, the Department stated that its supervisory powers can not arise from a vacuum. Any implied authority to act must arise from statute, regulation or its overall statutory or regulatory scheme. Id at 6-7, citing Massachusetts Electric Company v. Department of Public Utilities, 419 Mass. 239, 246 (1994).

Second, 220 CMR 14.06 (4) offer no basis for relief to Abbey. The purpose of 220 CMR 14.06 as stated at section 220 CMR 1406(1) is to establish complaint and dispute resolution procedures and associated penalties applicable to Customer complaints or damage claims between Retail Customers and Local Distribution Companies, Suppliers and Retail Agents doing business in the Commonwealth. 220 CMR. 14.06 (4) provides that complaints by a Customer under this section shall follow the procedures set forth in 220 CMR 25.02 (4) and further provides that alternative dispute resolution procedures may only be requested after the Customer and Local Distribution Company have attempted to resolve the dispute pursuant to 220 CMR 25.02 (4) (a).

As an initial matter, the dispute between Abbey and KeySpan does not result from Abbey's status as a KeySpan "Customer". Rather, the dispute is regarding the unwillingness of Abbey, the developer of a new condominium project that encroaches upon existing KeySpan distribution mains, to pay for relocation of mains impacted by its construction. In fact, KeySpan's sales group is currently engaged in separate discussions with Abbey regarding service to the new development. Therefore, Abbey does not qualify for relief under the provisions of this regulation. Moreover, even if Abbey were to be considered a "Customer" which they are not, the regulation requires that Abbey would first have been required to attempt to resolve the matter pursuant to the Department's billing and termination regulations 220 CMR 25.00. However, since the damages sought by KeySpan relate only to third-party damage to its infrastructure and not to the provision of gas service, there was no bill for service or any termination of service that could properly be subject to the Department's billing and termination regulations. Accordingly, the Department lacks the necessary authority and jurisdiction to order relief. Moreover, KeySpan's demand for payment is not a condition of service as alleged by Abbey (Complaint at 4). As noted above, the request for payment results from damages suffered by KeySpan as a result of third-party construction activity and would be due and owing whether the third-party was or is a customer. Finally, with regards to Abbey's claim that KeySpan's request for reimbursement constitutes an unfair and deceptive act or practice, which KeySpan vehemently disputes, the Department has traditionally declined to review such claims deferring instead to the courts under

traditional consumer protection statutes and regulations. Massachusetts OilHeat Council, D.T.E. 00-57, (2001) at 9, citing D.P.U. /D.T.E. 97-96 at 23-24.

Even if the Department were to conclude that it had the proper jurisdiction and authority to determine that the Abbey complaint constitutes a proper request for alternative dispute resolution under 220 CMR 14.06, the Abbey complaint fails to set forth a set of facts that would warrant an order of relief as a result of such process. 220 CMR 113.00 et seq is a public safety regulation. The regulation governs the operation, maintenance replacement and abandonment of cast-iron mains. There is no dispute that the Abbey project impacted KeySpan cast-iron mains and that KeySpan took action to relocate and protect those mains as required by the regulations. However, because the regulation does not govern payment responsibility when an action is required to be taken by a utility due to the construction activity of a third-party, there is no basis for the Department to “clarify requirements for cost reimbursement for cast-iron pipe replacement required in 220 CMR 113.00” as requested by Abbey. The only issue for possible investigation by the Department pursuant to 220 CMR 113.00 would be whether the Company properly complied with the regulations with respect to the work necessary to protect its infrastructure for the purpose of continuing to provide safe and reliable service to its customers.

Finally, Abbey argues that it should not be required to pay for the cost of the cast iron main replacement because of the age of the pipes. Rather, Abbey argues that all KeySpan customers should share in the cost of the work performed by KeySpan solely related to a construction project undertaken by Abbey. Such a finding would be contrary to public policy and result in higher rates for customers. KeySpan routinely encounters

situations where proposed third party construction projects impact its pipes and require that they be located and situations where third party contractors cause damage to its pipes during construction activities. In all such cases KeySpan seeks to recover its costs from those third parties. Abbey has been treated no differently. However, following Abbey's logic, any time a third-party's construction activity impacted utility infrastructure the utility would be unable to charge the contractor for such work; with the end result being that the utility's overall cost of service would increase and rates to consumer's would also increase.<sup>6</sup> The facts in this case demonstrate that KeySpan lawfully maintains pipes in Province Street and Chapman Place; that the Abbey project impacted those pipes; that KeySpan prudently incurred an incremental cost to relocate its pipes pursuant to Department regulations that it would otherwise not have incurred. Abbey, as the party that caused such expense is responsible for those costs. Any other result would be contrary to public policy and unjustly enrich Abbey at the expense of KeySpan and its customers.

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<sup>6</sup> It just so happens that in this case the pipes impacted are made of cast Iron and subject to specific regulation regarding replacement. Had the project impacted the location of KeySpan plastic or steel mains, KeySpan would still have been required to take the necessary steps to protect those pipes the cost of which would have been charge to Abbey.



For all of the above reasons, the Department should decline to grant Abbey the relief requested in its complaint and grant KeySpan's Motion to Dismiss.

Respectfully Submitted,

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